Filed 10/13/09 In re G.H. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re G.H., a Person Coming Under the Juvenile Court Law.	
SAN JOAQUIN COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. S.M., Defendant and Appellant.	C060745 (Super. Ct. No. J03834)

S.M., father of the minor, appeals from orders of the juvenile court, entered after a limited remand from appellant's previous appeal, reinstating the prior order terminating parental rights. (Welf. & Inst. Code, § 395; further undesignated statutory references are to the Welfare and Institutions Code.) Appellant contends that neither he nor the tribe were given proper notice of the hearing, the Human Services Agency (Agency) did not make active efforts to enroll the minor once it was known the minor was eligible for tribal

membership, and the court erred in finding the minor was likely to be adopted. Once again, we reverse.

FACTS AND PROCEEDINGS

As in the first appeal, the facts of the underlying dependency are irrelevant to the issues which are properly before us and the facts below are limited to the events after the selection and implementation hearing which led to the first appeal.

In the prior appeal, we concluded that the record did not reflect notice was sent to the Cherokee tribes although appellant had claimed Cherokee heritage. The termination orders were reversed and the case remanded to the trial court to permit compliance with the notice provisions of the Indian Child Welfare Act (ICWA) and to either reinstate termination of parental rights if the minor was not an Indian child or conduct a new selection and implementation hearing if the minor was determined to be an Indian child.

In July 2007, shortly after the remittitur issued in the prior appeal, the court had a hearing on ICWA issues and continued the hearing for notice to appellant.

In November 2007, a notice was sent to the Cherokee tribes which included the names of appellant and the paternal grandmother. The status review report stated notice had been sent and that the agency had made unsuccessful efforts to contact the family for further information on the minor's ancestry.

Appellant appeared at the continued ICWA hearing in January 2008 and was ordered to provide ancestry information to facilitate notice to the tribes. The Agency sent a second notice to the tribes in February 2008 which included the names of appellant, the paternal grandparents, and the paternal great-grandfather but no other identifying information. The Cherokee Nation responded that further information on the paternal great-grandfather was needed.

In April 2008, the Agency sent a third notice which added the middle name of the paternal great-grandfather and his birth date. In May 2008, the Agency sent a fourth notice which included all the previous information and the name and Cherokee tribal card number of the paternal great-uncle. Later, in May 2008, nearly a year after the reversal, the Agency sent a fifth notice to the Cherokee tribes which, in addition to all the previous information included the paternal great-grandfather's tribal membership number. The Cherokee Nation responded that the minor could be traced to a tribal member and was eligible for enrollment. The Cherokee Nation also informed the Agency that it was not empowered to intervene until the child or the parent applied and received membership. An application for membership for the child was enclosed with the response to the Agency.

In July 2008, minor's counsel filed a motion to reinstate the order terminating parental rights, arguing the minor needed permanence and that no enrollment had yet occurred, although the Cherokee Nation indicated the minor was eligible to apply.

Further, the notice required by the remand from the prior appeal was complete and it was now up to appellant, who had been given the application for membership for himself and the minor, to complete it and let the tribe determine membership status. The court ordered notice of the motion be sent to all parents. Notice of the hearing was also sent to the tribe.

The tribe informed the Agency that it had been more than 30 days and they had received no response to the first letter notifying them of the minor's eligibility for tribal membership. The tribe provided a second application to the Agency.

On August 20, 2008, appellant was present in court when the court continued the hearing on the motion to September 10, 2008, and set a contested hearing. Notice of the new date was sent to the tribe.

The tribe sent the Agency a second notification that it had been more than 60 days since the first application was provided and more than 30 days since the second application was provided and the minor's information would be removed from the active file due to lack of response.

At the September 10, 2008, hearing, appellant was present and the issue of application for tribal membership was discussed. According to appellant, the delay was due to the need for a birth certificate from the Department of Public Health, Office of Vital Records. A request had been sent to the department but no response had yet been received. According to counsel for the Agency, the tribe had informed them that, contrary to the letter sent by the tribe that either the child

or the parent could apply, appellant had to apply for membership first and that the Agency could not make the minor eligible by applying or they would have applied on the minor's behalf. Due to the difficulties in getting the necessary documents, the court continued the case to October 16, 2008, so that appellant would have more time to complete the application process. The tribe was given notice of this date.

However, on September 17, 2008, at the request of counsel for the Agency, who notified other counsel by e-mail of the date and time of the hearing on the request, the October 16, 2008, date was vacated and the hearing on the motion to reinstate termination of parental rights was reset to October 20, 2008. Appellant was not present at the hearing and no notice was sent to appellant or the tribe of the new date.

On October 20, 2008, appellant's counsel noted appellant was absent and did not know why. Appellant's counsel told the court appellant had received the necessary birth certificates and was applying for both himself and the minor at the same time. The court questioned why there was no proof that appellant had sent any paperwork to the tribe and appellant's counsel responded that the tribe would only accept complete applications.

The social worker testified she gave the application paperwork to appellant in May 2008 and gave the second packet to his counsel in August 2008. The court observed appellant was not present and there was no proof that he had filled out the application or done anything to enroll the minor in the Cherokee

Nation. In the absence of any proof that the application process had actually commenced, the court granted the motion to reinstate the order terminating parental rights.

DISCUSSION

I

Notice of Continued Hearing

Appellant contends there was reversible error because neither he nor the tribe had notice of the continued hearing which resulted in termination of his parental rights.

Until parental rights are terminated, parents are entitled as a matter of due process and statute, to notice of the juvenile proceedings. (*In re DeJohn B.* (2000) 84 Cal.App.4th 100, 106; § 294.) Similarly, the tribe is entitled to notice of all hearings until it is determined the ICWA does not apply. (§ 224.2, subd. (b).)

However, if a parent is properly noticed of the original hearing, and is present when the court continues the hearing to a new date, further notice is not required. (*In re Malcolm D.* (1996) 42 Cal.App.4th 904, 913.) If the parent is not present when the hearing is continued, notice of the continued hearing may be "by any other means that the court determines is reasonably calculated, under any circumstance, to provide notice of the continued hearing." (§ 294, subd. (d); see also *In re Phillip F.* (2000) 78 Cal.App.4th 250, 258.)

Appellant was present at the August 20, 2008, hearing and the September 10, 2008, hearing and thus was on notice that the

matter would be heard on October 16, 2008. The record does not disclose that appellant was aware of the September 17, 2008, hearing, which was scheduled by the Agency's counsel by means of e-mail, apparently only to opposing counsel. Appellant was not present on that date. Because the original date for the continued hearing was vacated and reset in appellant's absence, due process required that he be given notice of the new date.

Lack of notice of the continuance of the hearing amounts to constitutional error which is subject to the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711]) standard of prejudice. (*In re Angela C.* (2002) 99 Cal.App.4th 389, 394-395.) We cannot conclude that failure to notify appellant of the hearing date was harmless beyond a reasonable doubt. The purpose of the continuance was to give appellant time to secure necessary documents and begin the application process for tribal membership for himself and the minor. His presence at the hearing to provide evidence on his progress was central to the juvenile court's decision, as the juvenile court made clear. Indeed, it was appellant's absence and the resulting lack of evidence which resulted in granting the motion to reinstate termination of appellant's parental right. The lack of notice of any kind of the new hearing date at which the juvenile court terminated appellant's parental rights constituted a prejudicial denial of appellant's due process rights.

The tribe had notice of the September 10, 2008, hearing but not of the continuance. However, by the time that hearing was held, the tribe had closed its file on the minor for lack of action and declined to intervene. We need not determine whether these facts were equivalent to a determination that ICWA did not apply, rendering further notice unnecessary, because the case must be remanded for a new hearing at which time new notice can also be provided to the tribe. We note that the augmented record contains a Notice of Intervention by the Cherokee Nation.

II

Active Efforts to Enroll

Appellant contends the Agency failed to use active efforts to enroll the minor in the Cherokee Nation. Appellant also asserts that the juvenile court should not have merely reinstated the order terminating parental rights but should have followed the substantive provisions of the ICWA which would have required expert testimony and a heightened standard of proof.

A. *Active Efforts*

"If after notice has been provided as required by federal and state law a tribe responds indicating that the child is eligible for membership if certain steps are followed, the court must proceed as if the child is an Indian Child and direct the appropriate individual or agency to provide active efforts . . . to secure tribal membership for the child." (Cal. Rules of Court, rule 5.482(c), see also rule 5.484(c)(2).)

Appellant argues that the letters from the Cherokee Nation clearly stated that either the minor or the parent could be enrolled to make the child an Indian child within the meaning of the ICWA and trigger tribal intervention. Thus it would appear that the Agency could have completed the application on the minor's behalf and submitted it and any necessary paperwork to the tribe. However, all the Agency did was provide the application forms to appellant and discuss them with him. Counsel for the Agency represented to the court that the tribe wanted applications for both appellant and the minor and the Agency was unable to proceed solely on behalf of the minor. Counsel's statements are not evidence and thus cannot be relied upon to create a conflict in the evidence before the court. (*County of Alameda v. Moore* (1995) 33 Cal.App.4th 1422, 1426; Evid. Code, § 140.) Consequently the question is whether the evidence which is in the record established that the Agency made active efforts to enroll the minor.

Because we reverse for violation of appellant's due process rights, the tribe has now intervened and a new hearing is required, we need not resolve this question.

B. *Substantive provisions of ICWA*

California Rules of Court, rule 5.482(c) would appear to require that the court apply the substantive provisions of the ICWA where, as here, a tribe indicated a minor is eligible for membership if certain steps are followed. Generally, it is only the notice provisions and not the substantive provisions of the

ICWA which apply until it has been determined that the minor is an Indian child within the meaning of ICWA. (*In re L.B.* (2003) 110 Cal.App.4th 1420, 1427.)

For the reasons set forth above we need not resolve this issue either.

III

Likelihood of Adoption

Appellant contends the court erred in finding the minor was likely to be adopted.

While the question of adoptability was at issue in the section 366.26 hearing, it was not at issue in the limited remand or in the minor's motion to reinstate the prior orders. Accordingly, we may not address the issue in this appeal. (*In re N.M.* (2008) 161 Cal.App.4th 253, 264.)

DISPOSITION

The order reinstating the previous order terminating parental rights is reversed. The case is remanded to the juvenile court for further proceedings after proper notice to appellant and the Cherokee Nation.

HULL, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.